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Enforcement of Arbitral Awards in Sub-Sahara Africa

by DR EMILIA ONYEMA*

ABSTRACT

As the world celebrated the fiftieth anniversary of the New York Convention in 2008 it became necessary to examine the enforcement regimes for arbitration awards in Sub-Sahara Africa. This article examines the provisions for the recognition and enforcement, and requirements for the setting aside of both domestic and international arbitral awards under the arbitration laws of OHADA member states, Nigeria and Sudan, as representative of the legal regimes in Sub-Sahara African countries. The New York Convention applies to Convention awards in half of the countries of Sub-Sahara Africa. It is therefore relevant to examine the requirements for the enforcement of non-Convention awards in those states that are members of the New York Convention, and also in those states that are not members of the New York Convention. Different arbitration laws and regimes apply in the three representative jurisdictions chosen for this comparative analysis and these are also representative of the legal regimes in those countries with arbitration laws in the region. Though a generally supportive tendency towards the enforcement of arbitral awards can be gleaned from the examination of some arbitration-related judgments, this article again highlights the importance for the remaining countries in the region yet to sign up to and implement the New York Convention to consider adopting it, and for more arbitration hearings to be held within the region.

I. INTRODUCTION

THIS ARTICLE examines the issues surrounding the enforcement of arbitral awards by national courts in various countries within the Sub-Sahara region of the continent of Africa.[1] The issues examined in this article fall within the general field of research into the relationship between arbitration and national courts in

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1 The North African region comprises the following countries: Algeria, Egypt, Libya, Morocco, Tunisia and (as a non self governing territory, Western Sahara), whose arbitral award enforcement regimes are not examined in this article.

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which the attitudes of various national courts and national laws (and by extension the country itself) to arbitration are examined. There are 53 states within the African continent and 48 of these states are situated to the south of the Sahara desert.[2]

It is outside the scope of this article to examine the judicial attitudes of national courts in these 48 states. Three jurisdictions which are representative of three major strands of legal regimes discernible on this subject matter are examined for comparative purposes.[3] These are those states belonging to the OHADA[4] regime (to which 16[5] of these 48 states belong); those states that have implemented the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958[6] ('New York Convention') and/or whose arbitration law is modelled after the UNCITRAL Model Law on International Commercial Arbitration 1985 ('Model Law'), to which Nigeria (and 23 other states) belong;[7] and those states who have neither implemented the New York Convention nor modelled their arbitration laws on the Model Law and are not parties to the OHADA Treaty (there are 18 of these states and Sudan is examined as representing this category of states).[8] This article therefore does not examine the arbitral regime of states in Sub-Sahara Africa, but rather the various legal regimes discernible from arbitration laws in the states of Sub-Sahara Africa.[9]

II. ARBITRATION LAWS IN THE THREE REPRESENTATIVE JURISDICTIONS

The OHADA signatory states are predominantly of the civil law legal tradition, French speaking, and all but one[10] belong to the franc economic zone.[11] OHADA operates a uniform law regime which upon adoption becomes automatically

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2 *See* Table 1 below for a list of these states detailing their membership of the OHADA Treaty, New York Convention, ICSID Convention 1966 and those whose arbitration laws were influenced by the Model Law as at 2 December 2009.

3 The fourth strand will consist of those countries without any arbitration statute in force. The author is not aware of any country in Sub-Sahara Africa without such legislation.

4 OHADA is the acronym for Organisation pour L'Harmonisation en Afrique de Droit des Affaires (Organisation for the Harmonisation of Business Law in Africa) which was set up by a multilateral treaty originally concluded between 14 African states and signed in Port Louis on 17 October 1993. It currently has 16 member states with some more African states granted observer status. For details on OHADA *see* www.ohada.com/etat_partie.php?newlang=English. OHADA member states are geographically located in West and Central Africa.

5 The Democratic Republic of Congo is awaiting accession to the Treaty as its seventeenth member.

6 For a comprehensive examination of the enforcement regime of arbitral awards under the New York Convention, *see* Emmanuel Gaillard and Domenico Di Pietro (eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards: the New York Convention in Practice* (Cameron May, 2008).

7 For details of the adoption of the Model Law in Nigeria, *see* Amazu Asouzu, 'The Adoption of the UNCITRAL Model Law in Nigeria: Implications on the Recognition and Enforcement of Arbitral Awards' in (1999) *JBL* 185.

8 *See* Table 1 below for details.

9 This explains why the legal regime in South Africa and any particular state from East Africa is not examined, since these regimes generally fall within the same position found in Nigeria.

10 The Comoros is not a member of the CFA Franc Zone.

11 For details of this and the arbitration regime that operates in OHADA member states, *see* Emilia Onyema, 'Arbitration under the OHADA Regime' in (2008) 11(6) *Int'l ALR* 205.

applicable in all its member states. Within OHADA, there is the Common Court of Justice and Arbitration (CCJA) which has final jurisdiction on matters pertaining to OHADA Uniform Acts as they affect OHADA and its member states.[12] This article examines the OHADA Uniform Arbitration Act of 11 June 1999 (UAA)[13] and the role of the CCJA in the enforcement of arbitral awards within OHADA member states.[14] The UAA applies 'to any arbitration where the seat of the Arbitral Tribunal is in one of the Member States'[15]and to arbitral awards issued after it came into force.[16] However by the application of Article 21 of the OHADA Treaty,[17] the provisions of the UAA are relevant and apply where the underlying contract is to be performed (partially or totally) in any contracting state. This in effect implicates foreign awards from arbitration references arising from such contracts (awards made outside of the OHADA member states) with connection to any OHADA member state, requiring recognition and enforcement or nullification in a member state.

Nigeria is geographically located in West Africa, is a common law jurisdiction whose official language is English and is home to one of the Asian–African Legal Consultative Organisation[18] (AALCO) regional centres for international commercial arbitration in Lagos.[19] It is signatory to the New York Convention (since 15 June 1970) and its arbitration law is modelled after the Model Law. The Nigerian Arbitration and Conciliation Act 1988[20] (ACA) which implements both the New York Convention and the Model Law will be examined along with relevant judgments of the higher courts in Nigeria. The preamble to the ACA states that it applies to any award made in Nigeria and any New York Convention contracting state 'arising out of international commercial arbitration'.

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12 Other uniform acts are on Organising Securities of 17 April 1997; General Commercial Law of 17 April 1997; Commercial Companies and Economic Interest Group of 17 April 1997; Organising Simplified Recovery Procedures and Measures of Execution of 10 April 1998; Organising Collective Proceedings for Wiping Off Debts of 10 April 1998; Organising and Harmonising Undertakings' Accounting Systems of 24 March 2000; a new uniform act on contract law is currently under review. The text of the uniform acts are available at www.ohada.com/textes.php.

13 Journal Officiel de L'Organisatin pour L'Harmonisation en Afrique du Droit des Affaires (Organisation for Business Law in Africa) 11 June 1999, and *see* UAA, art. 35.

14 *See* Onyema, *supra* n. 11 at pp. 212–214. With thanks to Ms Hassatou Conde who translated the judgments of the CCJA for my use in this article.

15 UAA, art. 1.

16 *See* to this effect the judgment of the CCJA on 10 January 2002 in *Compagnie des Transports de Man* v. *Colina SA* (2003) 1 CCJA Juris Rep. 16.

17 OHADA Treaty of 17 October 1993, Art. 21, provides that 'a party to a contract may [rely on this Treaty] either because it has its domicile or its usual residence in one of the Contracting States, or if the contract is enforced or to be enforced in its entirety or partially on the territory of one or several contracting states'.

18 AALCO is an intergovernmental organisation made up of 47 members (Australia and New Zealand have observer status) as at 22 January 2009 and was established for the purpose of advancing the socio-economic and political interests of African and Asian countries. Details available at www.aalco.int/ (last accessed 22 January 2009). For a description of the effect of these AALCO institutions on arbitration in the continent, *see* Amazu Asouzu, *International Commercial Arbitration and African States*, (Cambridge University Press, 2001) pp. 53–112.

19 Available at www.rcical.org/index.html.

20 Cap. 19 Laws of the Federation of Nigeria, 1990, vol. 1, p. 393, in English. This law is a federal law. Some states have their own arbitration laws which are not modelled after the Model Law. However, the ACA applies in matters relevant to international commercial arbitration connected to Nigeria. The text of the ACA is available at www.nigeria-law.org/ArbitrationAndConciliationAct.htm.

The third state in this comparative analysis is Sudan, which in 2005 promulgated a new arbitration law but did not adopt the Model Law, is not an OHADA contracting state and is not party to the New York Convention, and is geographically located in the Northeast of Africa.[21] Sudan is, however, party to the Unified Convention for the Investments of Arab Capitals in the Arab World 1974[22] and the Riyadh Convention on Judicial Cooperation 1983.[23] The provisions of the Sudanese Arbitration Act 2005 (SAA) will be examined below.[24] The SAA applies to 'every arbitration conducted in the Sudan or abroad'.[25]

Each of these arbitration laws also state which court has competent jurisdiction to entertain arbitration-related applications. This may be dependent on the subject matter of the arbitration (especially relevant in a federation like Nigeria)[26] and possible situs of the assets (for example, in Sudan[27] and OHADA).[28] None of the three arbitration laws define what an award is but all three make detailed provisions on the requirements (formal and substantive) for a valid award.[29]

An examination of the attitude of national courts to arbitration must necessarily involve examination of:

- the legal environment relative to arbitration in the particular state. This involves the adoption of modern arbitration laws (laws based on or influenced by the UNCITRAL Model Law) and accession to the New York Convention. Table 1 below shows Sub-Sahara African state parties to the New York Convention, ICSID Convention[30] and OHADA Treaty, and those states whose arbitration laws are modelled after the Model Law;

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21 It is instructive to note that the following countries are neither OHADA member states nor parties to the New York Convention, neither are their arbitration laws modelled after the Model Law: Angola, Burundi, Cape Verde, Eritrea, Ethiopia, Gambia, Lesotho, Malawi, Mauritania, Namibia, Rwanda, Sao Tome and Principe, Seychelles, Sierra Leone, Somalia, Sudan, Swaziland.

22 Other members of the Convention are Egypt, Iraq, Jordan, Kuwait, Syria and Yemen, none of which is in Sub-Sahara Africa.

23 Other members of the Convention are Algeria, Bahrain, *Djibouti*, Iraq, Jordan, Kuwait, Lebanon, Libya, *Mauritania*, Morocco, Oman, Palestine, Qatar, Saudi Arabia, *Somalia*, Syria, Tunisia, UAE and Yemen. The three italicised member states are in Sub-Sahara Africa.

24 I thank Ahmed S.I. Bannaga who made the official English translation text of the Sudanese Arbitration Act 2005 available to me.

25 SAA, s. 3.

26 ACA, s. 57, refers to the High Courts (state and Federal Capital Territory Abuja) and federal High Courts as the competent courts with original jurisdiction over arbitration-related disputes in Nigeria and this was confirmed by the Supreme Court (Nigeria) in *Magbagbeola* v. *Sanni* [2005] 11 NWLR (pt 936) 239.

27 SAA, s. 4 defines 'competent court' as 'the originally competent court to consider the dispute where the same is not submitted to an arbitration tribunal', and according to SAA, s. 5, the competent court with supervisory jurisdiction over 'arbitration outside Sudan' is the general court in Khartoum.

28 The competent judge in a member state, and for enforcement and setting aside proceedings the final appeal rests with the CCJA, according to UAA, ar. 32 and confirmed by the CCJA in its judgment no. 010/2003 of 19 June 2003 in *Delpech Gerard and Delpech J.oelle* v. *Société SOCTACI* (2003) 1 CCJA Juris Rep. 49.

29 *See* UAA, arts. 20 and 21; ACA, s. 26; SAA, s. 33.

30 International Convention for the Settlement of Investment Disputes, 1966, Washington DC, of which 38 of these 48 states are members, while four of the remaining states have signed but not ratified and the remaining six states are yet to take any steps. The list in Table 1 below is culled from the list of ICSID contracting states, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>.

- the judgments of the higher courts and their pronouncements on arbitration related disputes. There are few published judgments on arbitration, particularly international arbitration related subject matters, available in states within Sub-Sahara Africa.[31] The reasons for this vary but will include the fact that very few such disputes come before these courts for adjudication.[32] Another very important reason is the fact that very few international arbitrations have their seat in the cities of Sub-Sahara African countries and fewer arbitral awards are sought to be enforced in these countries.[33] The courts therefore do not have the opportunity to assist such arbitrations through relevant decisions.[34] However, there are relevant judgments on domestic (and a few foreign) arbitral awards made by these courts. Evidence to back up this assertion can be taken from the 10 year (1998–2007) statistical overview of ICC arbitration published in 2008. Over this 10-year period, the ICC entertained arbitration references from 472 parties from sub-Sahara African countries, but only 27 arbitrations had their seats in countries in sub-Sahara Africa over the same period;[35]
- the availability of viable and active arbitration institutions[36]and arbitration associations[37] within the relevant state.

Generally, national courts may become involved in arbitration at three stages in the arbitral reference:[38]

- before commencement of the arbitration – to uphold the arbitration agreement and assist with the grant of anti-suit injunctions in favour of arbitration, give directions on the commencement of the arbitral reference, assist with the appointment of arbitrators and preservation of the assets which form the subject matter of the arbitration to protect it from dissipation;[39]

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31 One reason may be that in some of these countries only judgments of the higher courts (appeal and Supreme Courts) are published in the law reports. Such a state of affairs means that where relevant judgments are made in the trial courts, these are not reported.

32 Another reason may be that most arbitral awards are voluntarily complied with. The private nature of arbitration makes this claim (as in any other jurisdiction) anecdotal since this assertion cannot be empirically confirmed.

33 It appears that foreign parties arbitrating against parties from Sub-Sahara Africa, especially in respect of New York Convention awards, will seek enforcement of an arbitral award in their favour where assets are found outside the region, rather than in the countries of Sub-Sahara Africa.

34 Such decisions in themselves also evidence the attitude of such courts towards (international) arbitration.

35 *See* Table 3 below and 'ICC Arbitration: a Ten-Year Statistical Overview' in (2008) 19(1) *ICC Bull.* 51 at pp. 51–52 and 60.

36 Table 2 below gives a list of some arbitration institutions within Sub-Sahara African states.

37 Active arbitration associations include the Association of Arbitrators of South Africa; the Chartered Institute of Arbitrators has memberships from Botswana, Ethiopia, Ghana, Ivory Coast, Kenya, Lesotho, Malawi, Mauritius, Namibia, Nigeria, South Africa, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe, with active branches in Kenya, Nigeria and Zimbabwe, *see* www.arbitrators.org/Institute/Index.asp.

38 For more details on these stages, *see* Emilia Onyema, 'Power Shift in International Commercial Arbitration Proceedings' in (2004) 14 (1/2) *Caribbean Law Review* 62.

39 *See e.g.*, UAA, art. 5(b); ACA, ss. 4, 5, 7(2)(b), (3); SAA, ss. 9, 14(2).

- during the arbitral reference after its commencement – to assist the parties and the arbitral tribunal in its function of gathering evidence, determining the jurisdiction of arbitrators, challenge, removal and replacement of arbitrators and again in granting (or enforcing) interim measures or enforcing orders of the arbitral tribunal made in this regard;[40]
- after the award has been published by the arbitrators – by recognising and enforcing the final award, possible remission of the award back to the arbitral tribunal, and entertaining proceedings to nullify or set aside the arbitral award.

This article is primarily concerned with the third stage of these roles of national courts, that is the recognition and enforcement, and nullity or setting aside of arbitral awards. To examine these issues, the article is divided into two sections. Section III examines the grounds for recognition and enforcement of arbitral awards contained in the relevant laws applicable in the three representative jurisdictions, and section IV examines the grounds on which awards may be nullified or set aside under these laws. In these two sections, each sample jurisdiction is examined in turn, and the concluding section agrees that indeed there is still the need for modernisation of the arbitration laws of some of the states in Sub-Sahara Africa. However, since this is not all that is required for a modern arbitration jurisdiction, it calls for the siting of more arbitration references (especially international arbitration with any connection to the states) in these states to assist with the development of their own arbitral jurisprudence.

III. GROUNDS FOR THE RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

(a) OHADA

Recognition and enforcement of awards[41] within any OHADA contracting state is governed by article 25 of the UAA which recognises a valid award as final and binding on the parties with *res judicata* effect, and is accorded the same status as a judgment of a national court in all OHADA member states.[42] As a preliminary point, some OHADA member states are also parties to the New York Convention.[43] In such states, it is for the enforcing party to choose in which legal regime to pursue his application.[44] In those OHADA states that are not parties to

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[40] *See e.g.*, UAA, arts. 7, 12, 13, 14; ACA, s. 23; SAA, ss. 17, 28(2), 29.

[41] The provisions of the UAA apply to domestic, international or foreign awards.

[42] *See* UAA, arts. 20 and 21, which detail what should be contained in the award which must be reasoned, in writing and duly signed. *See also*, B. Martor, N. Pilkington, D.S. Sellers and S. Thouvenot, *Business Law in Africa: OHADA and the Harmonization Process* (2nd edn, GMB Publishing, 2007), pp. 267–271.

[43] These are Benin Republic, Burkina Faso, Cameroon, Central Africa Republic, Gabon, Guinea, Mali, Niger and Senegal.

[44] This is because UAA, art. 34 preserves the obligations of its member states under such conventions. This choice depends on the legal regime within which the award falls.

the New York Convention, enforcement and recognition can only be sought under the provisions of the UAA.[45]

To obtain enforcement of an arbitral award under the UAA, an exequatur (recognition) of the award must first be granted by a competent judge in a member state. The relevant member state may be the state where enforcement is also sought. This will most likely be the member state in which the losing party has assets upon which execution may be levied to satisfy the judgment debt. A pertinent question arising in this regard is whether exequatur can be granted in one member state and enforcement sought in another member state where there are assets on which to levy execution. The UAA is silent on this and the CCJA is yet to rule on the point. The authors of *Business Law in Africa* are of the opinion that this cannot be the case, since judgments of courts in the member states do not have extra-territorial effect.[46] The result of this view is that a winning party seeking enforcement of the arbitral award will have to obtain exequatur of the same award in each member state where he finds assets on which to levy execution until the award is fully satisfied. A contrary view is expressed in this article to the effect that such state of affairs does not appear to adequately represent the intention of the OHADA member states in their quest for harmonisation of their business laws (as stated in the Preamble to the OHADA Treaty) and that the practical result of this interpretation makes the enforcement regime under the UAA cumbersome.

In articulating a contrary opinion, it is suggested that, as the UAA is a uniform law, so that it is the same law that applies in all member states and the same conditions are required to be met for the grant of exequatur, where one member state grants exequatur, this order should be honoured by the courts of other member states.[47] To further support this view, the only grounds on which a grant of exequatur will be refused is on that of international public policy defined as the public policy of the member states.[48] This is not the public policy of each member state, so that the court before whom an application for exequatur is made can then apply its own notions of public policy in deciding whether to grant or reject the application. This again implies that the courts of all member states will apply the same public policy principles in this regard. Therefore, any concerns that may be entertained by courts of individual member states that in accepting an order of exequatur given by another member state in enforcement proceedings they may be violating their own principles of public policy will not arise. To the contrary, by accepting the order of exequatur, the courts of the member states exhibit trust in the decisions of each other in furtherance of the harmonisation vision of the heads of governments of the member states and this makes for a more efficient and cost-effective enforcement regime for arbitral

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45 These states are Chad, Comoros, Congo Brazzaville, Equatorial Guinea, Guinea Bissau and Togo.

46 *See* Martor *et al.*, *supra* n. 42 at p. 270.

47 It is the same UAA that applies in all the member states and so the same requirements for exequatur and enforcement apply.

48 UAA, art. 31(4).

awards in the OHADA region. Thus, the order of exequatur granted by one member state will only have to be registered with the courts of other member states as a formality and to obtain assistance with its execution by officers of that court.

Thus, the first step is to obtain exequatur of the award in the court of a member state by establishing the existence of the award and the arbitration agreement on which it is based. The party seeking exequatur of the award must produce the original award and arbitration agreement or authenticated copies of both the award and arbitration agreement[49] to the competent court, which will then grant exequatur of the arbitral award and enter that as the judgment of the court for enforcement purposes.[50] The last requirement is that if the documents (that is the award and arbitration agreement) are not in the French language, they must be translated into French. This requirement must be interpreted as being conditional on French being the language of the national court before which exequatur and enforcement is sought. This is necessarily so since the official language of some OHADA member states is not French, and a court speaks its own language.[51]

The application for exequatur and enforcement under the UAA requires the other party against whom the application is made to be put on notice. This is especially important where, as advocated in this article, the winning party can obtain exequatur in one member state and enforce the order in another member state. As mentioned above, the only ground on which a request for exequatur and enforcement of the arbitral award may be refused is where the 'award is manifestly contrary to international public policy of the member states'.[52] Therefore, the party against whom exequatur of an arbitral award is sought will not only know that such application has been made against him, but will have the opportunity to raise any issue of breach of international public policy against the enforcement of the arbitral award.[53] The UAA gives a third party 'who had not been called and when the award is damaging to his rights' the right to oppose the recognition and enforcement of the award before the arbitral tribunal but not to pro-actively seek nullification of the arbitral award before the courts of a member state.[54] It appears this provision will be relevant where there is an internal appeal mechanism against the arbitral award, so that the third party, although not party to the arbitration agreement and so to the award, may raise objections against

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49 These are the same documents required under Art. IV of the New York Convention. On this see Emilia Onyema, 'Formalities of the Enforcement Procedure (Articles III and IV)' in Gaillard and Di Pietro, *supra* n. 6 at p. 257.

50 UAA, arts. 30 and 31.

51 Spanish is the official language of Equatorial Guinea, Portuguese is the official language of Guinea Bissau, while the official languages of Cameroon are both French and English.

52 According to OHADA Treaty, Art. 10, 'Uniform Acts are directly applicable and overriding in the Contracting States notwithstanding any conflict they may give rise to in respect of previous or subsequent enactments of municipal laws'.

53 Furthermore, knowledge of such application may trigger voluntary compliance with the award or negotiation between the parties with a view to the performance of the award.

54 UAA, art. 25(4).

the award where its rights are affected by the decision. Apart from the difficulties with third party rights in arbitration highlighted by the authors of *Business Law in Africa*,[55] it also appears that since the provision empowers the third party to raise his objections before the arbitral tribunal and not the national court, it is not a right that impacts on proceedings to enforce the arbitral award.[56] There is no time limit as to when recognition and enforcement of an arbitral award may be sought under the UAA before the courts of a member state.

(b) Nigeria

The ACA contains sections applicable to both domestic and international arbitration proceedings and implements the New York Convention in Nigeria. Part III of the ACA applies to international commercial arbitration proceedings. Thus, a Convention award will be enforced under the provisions of the New York Convention pursuant to ACA, section 54(1). It is important to note here that the ACA contains the two reservations (reciprocity and commercial) allowed under the New York Convention.[57] However, with currently 143 signatory states, the reciprocity reservation under the New York Convention hardly has any practical relevance, since effectively Nigeria receives reciprocity regarding enforcement of awards made in Nigeria with 142 other countries in the world. Again, the definition of 'commercial' under ACA, section 57(1) includes practically all manner of commercial activities commonly entered into in international transactions, so that the contractual reservation again has little or no practical effect in this regard.[58]

For non-New York Convention but international arbitral awards, these will be enforced under section 51 of the ACA through an originating application before the competent court. Thus, a party seeking recognition and enforcement of its New York Convention award in Nigeria will proceed under Article IV of the New York Convention, under which he is required to produce to the relevant High Court or Federal High Court the original award and arbitration agreement or authenticated copies, where necessary duly translated into English (being the official language of Nigeria and the language of her courts).[59]

In accordance with ACA, section 54, where the party seeking enforcement of the award is not party to the New York Convention (or falls within the proviso to

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55 *See* Martor *et al.*, *supra* n. 42 at pp. 269–270.

56 Moreover upon making the final award, the arbitral tribunal becomes *functus officio* and the UAA does not empower the arbitral tribunal to grant exequatur or enforcement of the award.

57 ACA, s. 54(1)(a) requires the contracting state to have reciprocal legislation which recognises the enforcement of arbitral awards made in Nigeria, while sub-section (1)(b) provides, 'that the Convention shall apply only to differences arising out of a legal relationship which is contractual'.

58 ACA, s. 57(1) defines 'commercial' to include any trade transaction for the supply or exchange of goods and services, distribution, agency, factoring, leasing, construction of works, engineering, licensing, investment, financing, banking, insurance, concessions, joint ventures, carriage of goods and passengers by air, sea, rail or road.

59 *See* ACA, ss. 43 and 51.

that section)[60] then they can proceed under ACA, section 51,[61] which requires production of the same documents as those required under Article IV of the New York Convention listed above. The Court of Appeal (Nigeria) in *Ebokam* v. *Ekwenibe & Sons Trading Company* held that an appellant seeking enforcement of an arbitral award needs to produce these documents.[62] The court, however, went on to give a list of five items which the party seeking enforcement of the arbitral award needs to prove:[63]

(a) the making of the contract which contains the submission;
(b) that the dispute arose within the terms of the submission;
(c) that arbitrators were appointed in accordance with the clause which contains the submission;
(d) the making of the award; and
(e) that the amount awarded has not been paid.

It is submitted that these constitute additional requirements (and burdens) on the applicant which are an extension of what was required in ACA, section 31(1). The requirements of (a) and (b) above will be evidenced by production of the arbitration agreement, so that further proof of those facts contained in such document is not relevant.[64] Where the respondent challenges the contents of the arbitration agreement, then the burden of proof lies with the respondent.[65] Requirement (c) is not envisaged by the relevant sections but is a ground on which the award may be set aside as provided in ACA, section 48(a)(iii), which places the burden of proof on the respondent (who is the party seeking to set aside the award) and not on the appellant who is seeking to enforce the award. Requirements (d) and (e) are evidenced in the arbitral award, copy of which is attached to the application for enforcement, and thus should be conclusive proof of the facts stated in it. Approached in this way, the appellant seeking enforcement of the award will not need to bear this additional burden of proof, but where the respondent challenges the making of the award and the amount in it, then the burden of proof will fall on the respondent. Though the Court of Appeal in *Ebokam* v. *Ekwenibe & Sons Trading Company* came to the conclusion that the arbitration agreement and arbitral award attached to the application satisfied these requirements, the court had inadvertently created additional hurdles for the applicant seeking to enforce an arbitral award.

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60 The provisos provide for reciprocity and contractual relationship reservation under the New York Convention.

61 This section is in the same words as Model Law, art. 35 and applies to arbitral awards made in any other country (and not just New York Convention states as required under New York Convention, Art. IV).

62 The Court of Appeal in *Ebokam* v. *Ekwenibe & Sons Trading Company* [2001] 2 NWLR (pt 696) 32 held that an appellant seeking enforcement of an arbitral award needed to produce these documents.

63 *Ibid.* pp. 41–42.

64 In accordance with s. 132 of the Evidence Act of Nigeria, cap 112 Laws of the Federation of Nigeria, 1990, the text of which is available at www.nigeria-law.org/EvidenceAct.htm#Top.

65 In accordance with ACA, s. 48(a)(ii), (iv).

The ACA does not make provision for any grounds on which the losing party can defend an application for the recognition and enforcement of the award. The losing party can only challenge such application by filing an originating process to set aside the award in contest of the application for the recognition and enforcement of the award by virtue of ACA, sections 32 (domestic) and 52 (international). Section 29(1) provides that a party aggrieved by the award may within three months from the date of the award (or additional award) 'by way of an application for setting aside, request the court to set aside the award'. This originating process to set aside the award should be filed in the same court, so both applications will be heard in the same suit by the same court who is obliged to hear the setting aside application first.[66] However, as discussed below, an award which is not 'regular on its face' will not be enforced. This implies that this issue can be raised as a defence to the application to enforce the award and not by way of an originating application to set aside the award.

(c) Sudan

Section 40 of the Sudanese Arbitration Act (SAA) provides that the arbitral award shall be binding on the parties and be executed automatically. Where the arbitral award is not automatically executed, the party to the arbitral proceedings wishing to enforce such award must make a written request to the competent court for execution of the arbitral award. The only document required by the SAA to be attached to an enforcement application is an authentic copy of the original award. SAA, section 33 requires the award to be in writing, reasoned and signed by the arbitrator, while the request for arbitration must contain the arbitration agreement in accordance with the list provided under SAA, section 25(2). The effect of these provisions is that though section 40 does not expressly require the presentation of the arbitration agreement when seeking recognition and enforcement of the award, the arbitration agreement would be referred to in the arbitral award. This is substantiated by the mandatory requirement in SAA, section 8, that the arbitration agreement shall be in writing otherwise it shall be null and void, and the provision of SAA, section 6(1) to the effect that the non-existence, lapse or nullity of the arbitration agreement are issues that will ground the non-jurisdiction of the arbitral tribunal. Thus, the SAA legislator expected the question of the existence of a valid and enforceable arbitration agreement to have been conclusively dealt with by the arbitral tribunal before the award was made. In this manner, presentation of the arbitration agreement again at the stage of enforcement of the arbitral award was no longer necessary. This provision applies to enforcement proceedings of both domestic and international or foreign awards. This provision exemplifies the progressive nature of this aspect of the SAA and the Sudanese legislator's confidence in the arbitrator to determine the existence

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[66] The Court of Appeal (Nigeria) held in *Shell Trustees (Nig.) Ltd* v. *Imani & Sons (Nig.) Ltd* [2000] 6 NWLR (pt 662) 639 that where two applications are pending before the same court, one to set aside the award and the second to enforce the award, the court should hear the setting aside application first.

of such a primary document in the arbitral reference – a feat most other arbitration regimes (including the New York Convention) are yet to achieve, since most arbitration laws require the production of the arbitration agreement for the scrutiny of a national court where recognition and enforcement of the arbitral award is sought.

The other party to the arbitral award cannot raise any defence to the request for enforcement of the arbitral award. Again (as in Nigeria), where the losing party wishes to set aside the award, he can only do so through a nullity proceeding and not by way of defence to the enforcement application. The losing party wishing to nullify the arbitral award must apply for such nullification within two weeks from the date of the award and by putting the other party on notice.[67] It is therefore mandatorily provided under SAA, section 45(b) that a party seeking enforcement of an arbitral award that is not voluntarily and automatically complied with, must wait at least two weeks from the date of the award before applying for enforcement of the award. This ensures some degree of fairness, but the losing party must act pro-actively since two weeks from the date of the award is a very short time indeed. Applying for nullification of the arbitral award immediately it is published to the parties is very important, since once the time to apply for nullity lapses, the award will be enforced. This is especially important since there are no grounds allowed in the SAA to contest the application to execute the arbitral award. Clearly, this enforcement regime is not onerous but however applies only to arbitral awards emanating from domestic arbitration proceedings.

The legal regime for the execution of international arbitral awards in Sudan is, however, very onerous. SAA, section 7 provides that an arbitration is international where the headquarters of the business of the parties[68] is in two different states; and/or where the subject matter of the underlying contract is connected to more than one state, thus importing the presence of an international element. According to SAA, section 46, the party seeking execution of such international award is required to satisfy the competent court that:[69]

(a) the award was made in compliance with the arbitration rules or law it was subjected to;
(b) the award had become final under the arbitration law of the country where it was made;
(c) the other party has been put on notice and validly represented;
(d) the award is not inconsistent with any judgment of the courts of Sudan;
(e) the award is not contrary to the public policy or morals of Sudan;
(f) the country of origin of the award maintains a reciprocity of execution of judgments with Sudan.

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67 SAA, ss. 42 and 45.
68 Where the parties are individuals resident in two different states, the arbitration will be international as well.
69 These SAA, s. 46 requirements are independent of those of SAA, s. 45 on domestic awards.

In effect, the other party to the arbitral award can contest the request for execution of the foreign or international award by showing that any of the grounds listed above has not been proved by the party seeking execution of the international arbitral award.[70] This is a very different regime from those of the New York Convention and the Model Law, since the onus is on the party seeking enforcement to prove these facts. In this light, this legal regime for the enforcement of international arbitral awards in Sudan can be interpreted as not being friendly to awards made outside Sudan.

An examination of the grounds listed above makes the relevance of some of the requirements difficult to justify, especially since it is the winning party (and not the contesting party) that has the burden of proof. Applying the principle of waiver to requirement (a), justification for its relevance becomes very tenuous. As contained in various arbitration laws and rules, where any (non-mandatory) provisions of the applicable arbitration laws or rules are not complied with and this is not raised by a party to the arbitration, then such a party waives the right to raise and rely on that ground in contesting the enforcement of the award.[71] The SAA does not contain any provision on such waivers. Where the non-complaint matter is of a mandatory nature, the question that arises is whether the SAA seeks to enforce the application of the mandatory laws of other countries. If that is the case then that is an exception in arbitration laws in this regard.

The requirement of condition (b) is analogous to the requirement of Article V(1)(e) of the New York Convention.[72] The condition under requirement (c) to put the other party on notice is also contained in other arbitration laws and ensures fairness; however, the requirement to show that the party is validly represented may tend to defeat the claim. Imagine a scenario (which is not far-fetched) where the losing party (possibly Sudanese with all his assets in Sudan) refuses to participate in the proceedings even though he has been put on notice? This may be a tactical ploy to deprive the winning foreign party of the benefits of the arbitral award. In such a situation, is it really fair to refuse to entertain the enforcement application simply because the losing party 'is not validly represented'? Such a state of affairs can hardly be considered just.

The inclusion of condition (d) in the requirements raises the point of the relevance of compliance with judgments of the Sudanese courts at this stage especially where the law applicable to the substantive dispute is not Sudanese law. It is strongly suggested that requiring the arbitral award not to be inconsistent with any judgment of the Sudanese courts is irrelevant, except possibly where in applying Sudanese law (or on a point touching on the public policy of Sudan even if not decided under Sudanese law) the award contains decisions which are inconsistent with the judgment of the courts of Sudan. A proviso to this

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70 Note that in enforcing domestic arbitral awards the losing party cannot set up any defence.

71 *See e.g.*, Model Law, art. 4; UAA, art. 14(8); ACA, s. 33.

72 For a discussion on this point and relevant cases on the New York Convention, *see* Dana Freyer, 'The Enforcement of Awards Affected by Judicial Orders of Annulment at the Place of Arbitration' in Gaillard and Di Pietro, *supra* n. 6 at p. 761.

concession on this ground will be that this should refer to the judgment of the higher courts in Sudan. It is important that the fact that the arbitrator (especially over an international arbitral reference) is not 'subject' to the national courts of any states (not being a part of such public law structure) must be duly recognised and implemented in national arbitration laws.

The requirements of condition (f) limit the number of foreign or international awards that may be enforced or executed in Sudan. Not being party to the New York Convention yet, this requirement of reciprocity excludes the enforcement of awards emanating from all New York Convention states except awards made in those member states of the Riyadh Convention who are also members of the New York Convention.[73] In summary therefore, these conditions do not make the prospect of seeking enforcement of foreign awards in Sudan attractive. It is admitted that the chances of enforcing foreign awards (possibly outside the Arab and Middle East countries)[74] in Sudan may appear remote, however the prospect of needing to do so is not that far-fetched for those transacting their businesses within the continent (especially between nationals of two different African countries).

This analysis of the arbitration laws of the three representative jurisdictions evidences a few similarities and differences. Under the UAA, the only defence against the recognition and enforcement of an award is on the ground of international public policy of the member states. In Nigeria, technically there is no defence against an arbitral award which is regular on its face. An award which is formally invalid under the ACA, over a subject matter that is not arbitrable under Nigerian law or otherwise not in compliance with Nigerian public policy, is not regular on its face and therefore can be resisted on those grounds. A party wishing to resist enforcement on any of the grounds examined below must proceed by way of an originating application to set aside the arbitral award. In this way, the court before whom the application to enforce the award is made will have two applications: one to enforce the award and the other to set aside the award. The court so seised will take the application to set aside the arbitral award first.[75] In Sudan, in domestic arbitration there are no grounds on which an application to recognise and enforce a domestic arbitral award that is regular on its face can be defended.[76] There are, however, six grounds on which the enforcement of international arbitral awards can possibly be defeated. Under the UAA, ACA and where the New York Convention applies, the party seeking enforcement needs to present the arbitral award and arbitration agreement in

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[73] This limits such awards to those emanating from member states of the Riyadh Convention on Judicial Cooperation 1983 and where the award is covered by an applicable bilateral treaty (investment or otherwise).

[74] These states are covered under the Riyadh Convention 1983 or the Unified Convention 1974.

[75] So held the Court of Appeal (Nigeria) in *Shell Trustees (Nig.) Ltd* v. *Imani & Sons (Nig.) Ltd* [2000] 6 NWLR (pt 662) 639 at p. 659.

[76] An arbitral award that is not reasoned, over a subject matter that is not arbitrable or that is contrary to the public policy of Sudan is not regular on its face.

support of its application while in Sudan the only document required to be presented is the arbitral award.

IV. GROUNDS FOR NULLITY OR SETTING ASIDE OF AWARDS

(a) OHADA

A party against whom an arbitral award has been made under the UAA can seek to nullify the award. Such nullification proceedings may be commenced immediately the award is published to the parties and at the very latest one month after notification of the grant of exequatur of the award.[77] The effect of this provision of article 27 UAA is to make the limitation period for seeking nullification of the arbitral award dependent on the time of grant of exequatur for enforcement of the award. This effectively shifts the burden of pro-activeness onto the winning party where the award is not voluntarily performed. The effect of filing an application for nullity of the arbitral award is to automatically stay execution of the award.[78] The grounds on which an arbitral award may be nullified in an OHADA member state are exhaustive and are contained in UAA, article 26 which provides that recourse for nullity is only admissible in the following cases:

(i) if the arbitral tribunal has ruled without an arbitration agreement or on an agreement which is void or has expired;
(ii) if the arbitral tribunal was irregularly composed or the sole arbitrator was irregularly appointed;
(iii) if the arbitral tribunal has settled without conforming to the assignment it has been conferred;
(iv) if the principle of adversary procedure has not been observed;
(v) if the arbitral tribunal has violated an international public policy of the member states, signatories to the Treaty;
(vi) if no reasons are given for the award.

The grounds under (i) and (ii) above cover the existence of a valid and effective arbitration agreement and valid constitution of the arbitral tribunal. These are both matters that affect the jurisdiction of the arbitral tribunal to hear the dispute. Where there is no arbitration agreement in existence or it is void or has expired, then there is no evidence of the consent of the parties to arbitrate the underlying dispute. This is fatal to any consensual arbitral reference.[79] Ground (iii) protects the disputing parties by acting as a safeguard to ensure that the arbitral tribunal complies with its mandate by conforming to the instructions of

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[77] UAA, art. 27.
[78] UAA, art. 28(1).
[79] *See e.g.*, the discussions on this in Alan Redfern and Martin Hunter (with Nigel Blackaby and Constantine Partasides), *Law and Practice of International Commercial Arbitration* (4th edn, Thomson, 2004), p. 134.

the parties as evidenced in the arbitration agreement. Ground (iv) providing for adversarial procedure reflects the concept of the observance of due process under which each party is heard and given the opportunity to respond to the case presented against him by the other party. Ground (v) on international public policy also defines this to be the public policy (common) to the OHADA member states.[80] Ground (vi) which requires the production of a reasoned award reflects the mandatory requirement for the validity of the award under the UAA.[81] These are all grounds recognised internationally as capable of nullifying an arbitral award.[82] Where the arbitral award is nullified, the parties can commence another arbitration proceeding on the basis of the same arbitration agreement over the same subject matter if they so desire or repudiate the arbitration agreement and litigate their dispute.[83]

(b) Nigeria

A party aggrieved by an arbitral award can take recourse against the award through an application to set the award aside within three months from the date of the award.[84] The application (originating summons) to set aside the award must be made before the competent High Court or Federal High Court.[85] This time limit was applied by the Supreme Court (Nigeria) in *Bil Construction Co. Ltd* v. *Imani & Sons Ltd / Shell Trustees Ltd (a Joint Venture)*,[86] a case where the arbitral award was challenged six months after it was published to the parties, and again in *Arake* v. *Ejeagwu*, where the application to set aside the award was filed seven months after the award was made.[87]

The party can apply to set aside an arbitral award on any of the following grounds of the ACA:[88]

(a) the award contains decisions on matters which are beyond the scope of the submission to arbitration (it is only those matters not submitted to arbitration that may be set aside) pursuant to section 29(2);
(b) the arbitrator misconducted himself pursuant to section 30(1);
(c) the arbitral proceedings or award have been improperly procured pursuant to section 30(1).

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80 An example is the mandatory provisions in the uniform acts as provided under OHADA Treaty, Art. 10.
81 *See* UAA, art. 20(2). This basically implies that parties cannot empower the arbitral tribunal to issue an unreasoned award. Where, under UAA, art. 15(2), parties authorise the arbitrators to decide as *amiable compositeur*, the award still must be reasoned.
82 Compare this provision with Art. V of the New York Convention.
83 UAA, art. 29. This is subject to the subject matter being arbitrable.
84 This right is lost if the application is not made within the time provided.
85 ACA, s. 29.
86 *Bil Construction Co. Ltd* v. *Imani & Sons Ltd / Shell Trustees Ltd (a Joint Venture)* [2006] 19 NWLR 1.
87 *Emmanuel Oseloka Araka* v. *Ambrose Nwankwo Ejeagwu* [2000] 15 NWLR (pt 692) 684.
88 *See also*, ACA, s. 48, which contains the same grounds and applies to international commercial arbitration proceedings.

These grounds for setting aside are limited to matters affecting the scope of the arbitration agreement and the conduct of the arbitral proceedings by the arbitrator. Where the award is on matters outside the scope of the arbitration agreement, it is a question of lack of jurisdiction of the arbitral tribunal to determine the issue. In accordance with international arbitral jurisprudence, this failure is not fatal to the validity of the whole award where such issues can be separated or severed from the other issues in the award, so that the parts of the award falling within the arbitration agreement can be enforced and the others falling outside it can be set aside. The second ground on the arbitral proceedings or award being improperly procured implies questions of due process.[89]

The term 'misconduct' is not defined in the ACA, but under the common law it denotes irregularity.[90] The Supreme Court (Nigeria) held in *A. Savoia Ltd* v. *A.O. Sonubi*[91] that misconduct includes the following:

- where the arbitrator fails to comply with the terms, express or implied, of the arbitration agreement;
- where, even if the arbitrator complied with the terms of the arbitration agreement, the arbitrator makes an award which on grounds of public policy ought not to be enforced;
- where the arbitrator has been bribed or corrupted;
- technical misconduct, such as where the arbitrator makes a mistake as to the scope of the authority conferred by the agreement of reference; this, however, does not mean that every irregularity of procedure amounts to misconduct;
- where the arbitrator or umpire fails to decide all the matters which were referred to him;
- where the arbitrator or umpire has breached the rules of natural justice;
- if the arbitrator or umpire has failed to act fairly towards both parties as, for example, by hearing one party but refusing to hear the other; or by deciding the case on a point not put by the parties.[92]

An additional example of misconduct is where there is error of law on the face of the award. This is not provided for under the ACA but is part of the common

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89 An example is where an allegation of bribery was made against the arbitrator. Such allegation is also a matter of misconduct.

90 Some cases on misconduct include: *Taylor Woodrow (Nig.) Ltd* v. *SE GMBH* [1993] NWLR 127; *LSDPC* v. *Adold Stamm Int'l Ltd* [1994] 7 NWLR 545; Court of Appeal (Nigeria) decision in *Baker Marine Nig. Ltd* v. *Chevron Nig. Ltd* [2000] 12 NWLR (pt 681) 393; *William* v. *Wallis & Cox* [1914] 2 KB 497; *see also*, J.O. Orojo and M.A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates, 1999), pp. 276–280.

91 *A. Savoia Ltd* v. *A.O. Sonubi* [2000] 12 NWLR (pt 682) 539.

92 *Ibid.* p. 547, quoting the decision in *Taylor Woodrow (Nig.) Ltd* v. *Suddeutsche Etna-Werk GmBH* [1993] 4 NWLR (pt 286) 127 from a list taken from para. 622 of *Halsbury's Laws of England* (4th edn), vol. 2, pp. 330–331; *see also* the decisions of the Supreme Court (Nigeria) in *Comptoir Commercial & Industrial SPR Ltd* v. *Ogun State Water Corporation and another* [2002] 9 NWLR (pt 773) 629 (on technical misconduct).

law legacy which falls under 'misconduct' as decided by the Supreme Court (Nigeria) in *Taylor Woodrow of Nigeria Ltd* v. *Suddeutsche Etna-Werk GmBH*.[93]

On the justification for retaining the ground of misconduct in the ACA, Orojo and Ajomo explain:

> Since the intention of the parties to the arbitral proceedings is that the award should be final, what the law permits is not an appeal, but that where the arbitrator conducts himself in a way inconsistent with the reasonable expectations of the parties as to fairness in the conduct of the proceedings, the court on application by the party aggrieved may intervene and set aside the award in the interest of justice.[94]

The ACA is currently under review but the text of the draft Arbitration Bill retained references to misconduct of the arbitrator as a ground for setting aside an arbitral award in Nigeria.[95] It appears from an examination of the grounds on which applications against enforcement of awards in Nigeria are based, a high proportion of cases are brought on the grounds of misconduct of the arbitrator. From the list by the Supreme Court quoted above, every single issue on the list is covered under the grounds listed in section 48 (quoted below) which thus implies a repetition, but more importantly the Supreme Court list is not exhaustive. This leaves room for legal practitioners to pursue setting aside applications on spurious grounds under the broader label of 'misconduct' of the arbitrator, thereby justifying a call to delete the ground from the ACA and furthermore to make the grounds contained in the ACA exhaustive and the only grounds on which an arbitral award can be set aside. The exclusivity of the grounds under the ACA for setting aside purposes makes for certainty in the law, brings the ACA more in conformity with modern trends in the law of arbitration, and closes this gap, which leaves room for wasting of time and resources of both the disputing parties and the courts.

Thus, a losing party can (and should) pro-actively seek to set aside the arbitral award without necessarily waiting for the winning party to seek recognition and enforcement of the award. Where the winning party applies for recognition and enforcement of the arbitral award within the three months time limit, the losing party wishing to set aside the arbitral award on any of these grounds must apply to the same court by originating motion and not raise these grounds as a defence to the recognition and enforcement of the arbitral award.

The grounds on which an arbitral award emanating from an international arbitration reference (which is not a New York Convention award) may be set aside are provided for under section 48. The section provides that the court may set aside an arbitral award:

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93 *Taylor Woodrow (Nig.) Ltd* v. *Suddeutsche Etna-Werk of GmBH* [1993] 4 NWLR (pt 286) 127.

94 Orojo and Ajomo, *supra* n. 90 at p. 275.

95 The Draft Federal Arbitration and Conciliation Bill is currently before the National Assembly. This draft Bill still contains references to arbitrator misconduct.

(a) If the party making the application furnishes proof –

(i) that a party to the arbitration agreement was under some incapacity;
(ii) that the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, that the arbitration agreement is not valid under the laws of Nigeria;[96]
(iii) that he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case; or
(iv) that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; or
(v) that the award contains decisions on matters which are beyond the scope of submission to arbitration, so however that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decision on matters not submitted to arbitration may be set aside; or
(vi) that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate; or
(vii) where there is no agreement between the parties under subparagraph (vi) of this paragraph, that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with this Act; or

(b) If the court finds –

(i) that the subject-matter of the dispute is not capable of settlement by arbitration under laws of Nigeria;[97] or
(ii) that the award is against public policy of Nigeria.

Section 48 grounds are the same as those under article 34(2) of the Model Law[98] and are in addition to those grounds for setting aside arbitral awards provided under ACA, sections 29 and 30.[99] These section 48(a) grounds are an expanded version of the grounds under sections 29 and 30, while the grounds under section 48(b) are the same as those that will make the award 'not valid on

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[96] The Model Law referred to 'the law of this State' while the ACA refers to 'the laws of Nigeria', expanding the provision of the Model Law which intended reference to the arbitration law of the adopting state. With the extension under ACA, the potential to argue that it refers to Nigerian laws and not just to the ACA is a reality.

[97] Matters not arbitrable under Nigerian law include crimes, illegal contracts, gaming and wagering, divorce, bankruptcy, insolvency, admiralty: *KSUDB* v. *Franz Construction Ltd* [1990] 4 NWLR 172.

[98] The Model Law grounds are exclusive but ACA, s. 48 deleted the words 'only if' contained in Model Law, art. 34(2).

[99] This is by virtue of ACA, s. 43.

its face', though it is helpfully clearly stated that matters of arbitrability and public policy must be those of Nigeria.

(c) Sudan

A party seeking to nullify an award in Sudan must apply to the competent court for such nullification within two weeks after the judgment of the court granting execution of the arbitral award.[100] The practical effect of this provision is to extend the time by which a party not satisfied with the arbitral award can seek to nullify the award. Such a party need do nothing until the winning party seeks recognition of the award before the courts. This provision is two-pronged, thus the losing party may also wish pro-actively to set aside the award and not just wait for the winning party to seek recognition and enforcement of the award before he applying to set aside the award.

SAA, section 41 lists grounds on which a party can seek to nullify an arbitral award. These are:

(i) where the award relates to decisions outside or beyond the scope of the arbitration agreement so that the arbitral tribunal lacked jurisdiction to decide such disputes. There is no provision for bifurcation so that where some issues decided fall within the arbitral tribunal's jurisdiction, such issues can be executed. This implies that the arbitration agreement will be required to be exhibited (and examined) where nullification of the award is sought on this ground since it is not one of the documents to be attached to the enforcement application;
(ii) corruption or misconduct of the arbitrators or any one of them. It appears that the same common law interpretations of what constitutes misconduct examined above (under Nigeria) will apply in Sudan as well;
(iii) existence of serious neglect of a basic procedure of the arbitration proceedings. This ground refers to the requirement of the exercise of due process by the arbitral tribunal. However, to invalidate an award the breach must be so fundamental as to cause injustice. This ensures that mere technical misconduct will not ground a nullification application;
(iv) where the award is not reasoned, since this is a mandatory requirement of the SAA;[101]
(v) where the award is contrary to the public policy of Sudan (this will include where the subject matter of the dispute is not arbitrable under the laws of Sudan).

The competent court has discretion whether to nullify the award even where any of these grounds are proved. In the case of foreign awards, the same grounds apply where a party seeks to nullify the award in Sudan.

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[100] Under SAA, s. 42, which application may operate as a stay of execution of the award under SAA, s. 44.
[101] This is a mandatory requirement under SAA, s. 33.

V. CONCLUSION

The provisions of the arbitration laws in these three representative jurisdictions are indicative of the provisions of the arbitration laws in force in the 48 countries of Sub-Sahara Africa as they affect the recognition and enforcement and setting aside of arbitral awards, both domestic and international or foreign. This analysis clearly shows that these arbitration laws are modern and contain internationally recognised principles of arbitration relevant to arbitral awards.[102] However, it also reveals the importance of membership of the New York Convention for the recognition and enforcement of international or foreign awards. OHADA, although having a comparatively modern (being a 1999 law) arbitration legal regime, is not party to the New York Convention either as a regional body or as it affects most of its member states, and its application is limited to awards made in and sought to be enforced in its member states. Sudan, on its part, has a new arbitration law adopted in 2005 but not modelled after the Model Law and is not party to the New York Convention. The provisions on the recognition and enforcement of awards (especially foreign awards) in this new law are more onerous than those internationally accepted as contained in the New York Convention regime. Just two examples examined above demonstrate this: (i) the burden of proof on the party seeking enforcement of a foreign award, and (ii) its requirement for reciprocity in the enforcement of foreign awards.

In suggesting the adoption of the Model Law by countries of Sub-Sahara Africa, it is important to stress that the benefits of uniformity and familiarity are largely lost where the Model Law is adopted but with so many additions or modifications as to fundamentally change its pro-arbitration character. As much as adoption or adaptation of the Model Law is important for countries of Sub-Sahara Africa, more important is membership of the New York Convention which gives reciprocity access to 143 countries in the world for the recognition and enforcement of foreign arbitral awards. The great benefit of membership of the New York Convention can be buttressed by the recent decision of the English Court of Appeal in *IPCO (Nig.) Ltd* v. *NNPC*.[103] This decision arose out of a submission to arbitration which took place in Nigeria, between two companies established under the laws of Nigeria and carrying on business in Nigeria (so for all purposes a domestic arbitration). The arbitral award had been made in favour of IPCO, which award was being challenged by NNPC before the Federal High Court in Nigeria.[104] The award was made in 2004 and partial enforcement was finally granted in 2008 in England on the basis of the English Arbitration Act 1996, which implements the New York Convention in England. This decision demonstrates the benefit of the provisions of the New York Convention to parties

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[102] Such principles include the finality of arbitral awards, *res judicata* status of arbitral awards and limited grounds of review of arbitral awards.

[103] *IPCO (Nig.) Ltd* v. *Nigerian National Petroleum Corp. (NNPC)* [2008] EWCA Civ 1157.

[104] The setting aside application before the Federal High Court was still pending as at 22 January 2009.

in both domestic and international arbitral references in whose favour an arbitral award is made, in the enforcement of such awards. It is added incentive to those countries of Sub-Sahara Africa who are not yet party to the Convention in their deliberations on whether to sign up to the Convention or not.

For the most part, national courts in these jurisdictions are arbitration friendly and demonstrate their willingness to enforce valid arbitration agreements, especially in international commercial contracts. It is therefore important that parties (especially those connected to the continent) actively choose cities within the continent as their seat of arbitration. This should be encouraged, especially since arbitration references under the auspices of arbitration institutions can generally be held in any city of the world. In this way, parties that are cautious of the development of arbitration within Sub-Sahara Africa can always conduct their reference under the arbitration rules of a particular institution but with the seat of arbitration in one of the cities of Sub-Sahara Africa. This may result in the application and testing of the provisions of these arbitration laws in the national courts of these countries, which will lead to the development of relevant arbitral jurisprudence and expertise within these countries and be of benefit for the larger world of arbitration.

VI. APPENDIX: TABLES

TABLE 1 *Countries of Sub-Sahara Africa*

No.	*Country*	*OHADA*	*New York Convention*	*UNCITRAL Model Law*	*ICSID Convention*
1	Angola	–	–	–	–
2	Benin Republic	17 Oct 1993	14 Aug 1974	–	14 Oct 1966
3	Botswana	–	19 Mar 1972	–	14 Feb 1970
4	Burkina Faso	17 Oct 1993	21 June 1987	–	14 Oct 1966
5	Burundi	–	–	–	5 Dec 1969
6	Cameroon	17 Oct 1993	19 May 1988	–	2 Feb 1967
7	Cape Verde	–	–	–	–
8	Central Africa Republic	17 Oct 1993	13 Jan 1963	–	14 Oct 1966
9	Chad	17 Oct 1993	–	–	14 Oct 1966
10	Comoros	17 Oct 1993	–	–	7 Dec 1978
11	Congo Brazzaville	17 Oct 1993	–	–	14 Oct 1966
12	Democratic Republic of Congo	seeking accession	–	–	29 May 1970
13	Cote d'Ivoire	–	2 May 1988	–	14 Oct 1966
14	Djibouti	–	27 June 1977	–	–
15	Papua Guinea	17 Oct 1993	–	–	19 Nov 1978
16	Eritrea	–	–	–	–
17	Ethiopia	–	–	–	signed 1965
18	Gabon	17 Oct 1993	15 Mar 2007	–	14 Oct 1966
19	Gambia	–	–	–	26 Jan 1975
20	Ghana	–	8 June 1968	–	14 Oct 1966
21	Guinea	21 Nov 2000	23 April 1991	–	4 Dec 1968
22	Guinea Bissau	24 Feb 1996	–	–	signed 1991
23	Kenya	–	11 May 1989	1995–	2 Feb 1967
24	Lesotho	–	–	–	7 Aug 1969
25	Liberia	–	15 Dec 2005	–	16 July 1970
26	Madagascar	–	14 Oct 1962	1998–	14 Oct 1966
27	Malawi	–	–	–	14 Oct 1966
28	Mali	17 Oct 1993	7 Dec 1994	–	2 Feb 1978
29	Mauritania	–	–	–	14 Oct 1966
30	Mauritius	–	30 April 1997	–	2 July 1969
31	Mozambique	–	9 Sept 1998	–	7 July 1995
32	Namibia	–	–	–	Signed 1998
33	Niger	17 Oct 1993	12 Jan 1965	–	14 Dec 1966
34	Nigeria	–	15 June 1970	1990–	14 Oct 1966
35	Rwanda	–	29 Jan 2009	–	14 Nov 1979
36	Sao Tome & Principe	–	–	–	signed 1999
37	Senegal	17 Oct 1993	15 Jan 1996	–	21 May 1967
38	Seychelles	–	–	–	–
39	Sierra Leone	–	–	–	14 Oct 1966
40	Somalia	–	–	–	30 Mar 1968
41	South Africa	–	1 Aug 1976	–	–
42	Sudan	–	–	–	9 May 1973
43	Swaziland	–	–	–	14 July 1971
44	Tanzania	–	12 Jan 1965	–	17 June 1992
45	Togo	17 Oct 1993	–	–	10 Sept 1967
46	Uganda	–	15 May 1992	2000–	14 Oct 1966
47	Zambia	–	12 June 2002	2000–	17 July 1970
48	Zimbabwe	–	28 Dec 1994	1996–	19 June 1994

TABLE 2 *List of some arbitration institutions in countries of Sub-Sahara Africa*[105]

No.	*Institution/Centre*	*Country*
1	Arbitration, Mediation and Conciliation Centre of the Chamber of Commerce and Industry of Benin	Benin Republic
2	Conciliation and Arbitration Chamber of the Cotton Inter-professional Association of Cotonou	Benin Republic
3	Ouagadougou Arbitration, Mediation and Conciliation Centre of the Chamber of Commerce and Industry	Burkina Faso
4	GICAM (Employers Association) Arbitration Centre Douala	Cameroon
5	Congo Arbitration Centre	Democratic Republic of Congo
6	Addis Ababa Chamber and Sectorial Association Arbitration Institute	Ethiopia
7	Ghana Arbitration Centre	Ghana
8	Court of Arbitration of Ivory Coast	Ivory Coast
9	Joint Court of Justice and Arbitration of OHADA	Ivory Coast
10	Directorate of Dispute Prevention and Resolution	Lesotho
11	Arbitration Centre of Madagascar	Madagascar
12	Mali's Conciliation and Arbitration Centre	Mali
13	Permanent Court for Arbitration at the Mauritius Chamber of Commerce and Industry	Mauritius
14	Centre for Arbitration, Conciliation and Mediation	Mozambique
15	Lagos Regional Centre for International Commercial Arbitration	Nigeria
16	Common Court of Justice and Arbitration	OHADA
17	Arbitration Centre of Dakar's Chamber of Commerce, Industry and Agriculture	Senegal
18	Dakar Arbitration and Mediation Centre	Senegal
19	Khartoum Center for Arbitration	Sudan
20	International Chamber of Arbitration	Sudan
21	Arbitration Foundation of Southern Africa	South Africa
22	Commission for Conciliation, Mediation and Arbitration	South Africa
23	National Construction Council	Tanzania
24	Conciliation, Mediation and Arbitration Commission	Swaziland
25	Zambia Centre for Dispute Resolution	Zambia
26	Commercial Arbitration Centre in Harare	Zimbabwe

TABLE 3 *Participation of parties from and cities in Sub-Sahara Africa in ICC arbitration references between 1998 and 2007 (published by the ICC in 2008)*

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	*Total*
Parties	30	33	68	52	52	55	53	40	56	33	472
Cities	1	2	0	1	7	2	0	4	4	0	27

[105] Available at www.jurisint.org/en/ctr/index.html.